

1993

# The State of Utah v. John Burke : Brief of Appellee

Utah Court of Appeals

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S. Junior Baker; Baker and Hicken; Attorney for Appellee.

Michael J.S. Thompson; Attorney for Appellant.

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## Recommended Citation

Brief of Appellee, *Utah v. Burke*, No. 930541 (Utah Court of Appeals, 1993).

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UT

NO. 930541

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UTAH COURT OF APPEALS

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SPANISH FORK CITY,	:
	:
Plaintiff/Appellee,	: Case No. 930541-CA
	:
vs.	:
	: Priority No. 2
JOHN BURKE,	:
	:
Defendant/Appellant.	:

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BRIEF OF APPELLEE

- - - - -

APPEAL TAKEN FROM A JUDGMENT OF CONVICTION IN  
THE FOURTH CIRCUIT COURT, STATE OF UTAH  
UTAH COUNTY, SPANISH FORK DEPARTMENT  
THE HONORABLE JOHN BACKLUND, PRESIDING

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Attorney for Appellant

**FILED**

MAR 3 1994

**COURT OF APPEALS**

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UTAH COURT OF APPEALS

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SPANISH FORK CITY, :  
 : Case No. 930541-CA  
Plaintiff/Appellee, :  
vs. :  
 : Priority No. 2  
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# LIST OF PARTIES

Plaintiff: Spanish Fork City

Defendant: John Burke

Appellee: Spanish Fork City

Appellant: John Burke

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	ii
CASES . . . . .	ii
STATUTES AND ORDINANCES . . . . .	ii
JURISDICTION OF THE APPELLATE COURT . . . . .	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW . . . . .	1
DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS . . . . .	2
STATEMENT OF THE CASE . . . . .	2
I. NATURE OF THE CASE . . . . .	2
II. STATEMENT OF FACTS . . . . .	2
SUMMARY OF ARGUMENT . . . . .	4
POINT I . . . . .	4
POINT II . . . . .	4
POINT III . . . . .	4
POINT VI . . . . .	4
POINT V . . . . .	5
ARGUMENT . . . . .	5
POINT I: THE CITY ORDINANCE IS NOT VAGUE NOR UNCONSTITUTIONAL . . . . .	5
POINT II: THE EVIDENCE WAS SUFFICIENT TO CONVICT THE DEFENDANT . . . . .	6
POINT III: THE DEFENDANT RECEIVED A FAIR AND IMPARTIAL TRIAL . . . . .	8
POINT VI: THE DEFENDANT WAS NOT PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL . . . . .	9
POINT V: THE DEFENDANT MAKES NUMEROUS ASSERTIONS IN HIS BRIEF AND ADDENDA WHICH WERE NOT RAISED AT TRIAL AND WHICH CANNOT BE CONSIDERED FOR THE FIRST TIME ON APPEAL . . . . .	10
CONCLUSION . . . . .	11

## TABLE OF AUTHORITIES

CASES:	PAGE
<u>Barber vs. Farmers Insurance Exchange</u> 751 P.2d 248 (Utah App. 1988) . . . . .	1
<u>E. A. Strout Western Realty, Inc. vs. W. C. Foy and Sons, Inc.</u> 665 P.2d 1320 (Utah App. 1983) . . . . .	1
<u>State vs. Archambeau</u> 820 P.2d 920 (Utah App. 1991) . . . . .	10
<u>State vs. Brooks</u> 225 U.A.R. 15 (Utah App. 1993) . . . . .	1, 2, 10
<u>U.S. Civil Service Commission vs. National Association of Letter Carriers</u> 413 U.S. 548 935 Ct. 2880 (1973) . . . . .	6
STATUTES AND ORDINANCES:	
Spanish Fork Municipal Code 8.24.020 . . . . .	2, 5, 7
Spanish Fork Municipal Code 8.24.030 . . . . .	3, 5
Spanish Fork Municipal Code 8.24.040 . . . . .	3, 5, 7
Utah Code Annotated § 10-8-60 (1953 as amended) . . . . .	5

## JURISDICTION OF THE APPELLATE COURT

The Utah Court of Appeals has jurisdiction over this action pursuant to Utah Code Annotated § 78-2a-3(2)(f).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is the Spanish Fork City nuisance ordinance unconstitutional for vagueness?

Standard of review: Judge John Backlund ruled the ordinances are constitutional. The trial court's legal conclusions are afforded no deference. Barber vs. Farmers Insurance Exchange 751 P.2d 248 (Utah App. 1988).

2. Did the Defendant receive a fair and impartial trial with sufficient evidence to convict him?

Standard of review: Judge John Backlund found the Defendant guilty after hearing the evidence. The trial court's factual findings are to be upheld unless reasonable minds must reach a contrary conclusion. The evidence is viewed in the light most favorable to the verdict. E. A. Strout Western Realty, Inc. vs. W. C. Foy and Sons, Inc. 665 P.2d 1320 (Utah 1983).

3. Was the Defendant's case prejudiced by ineffective assistance of counsel?

Standard of review: The Defendant is not entitled to a reversal based on ineffective assistance of counsel unless his defense has been prejudiced. State vs. Brooks 225 U.A.R. 15 (Utah App. 1993).

4. May the Defendant raise issues for the first time on appeal?

Standard of review: Issues may not be raised for the first time on appeal. State vs. Brooks 225 U.A.R. 15 (Utah App. 1993).

#### **DETERMINATIVE ORDINANCES**

Spanish Fork City Ordinance	8.24.020
Spanish Fork City Ordinance	8.24.030
Spanish Fork City Ordinance	8.24.040

#### **STATEMENT OF THE CASE**

##### **I. NATURE OF THE CASE**

Defendant, John Burke was found guilty of maintaining a nuisance. He owns property located within Spanish Fork City which has a large number of mostly old items scattered about.

##### **II. STATEMENT OF THE FACTS**

The Defendant, John Burke, was charged with creating a public nuisance on or about January 27, 1993.

Spanish Fork Municipal Code 8.24.020 defines a nuisance as follows:

Notwithstanding any provisions of state law, a nuisance is defined to mean any condition or use of premises or building exteriors which are deleterious or injurious, obnoxious or unsightly which include, but is not limited to keeping or depositing on, scattering over the premises:

a. Lumber, junk, trash, or debris;



- b. Abandoned, discarded, or unused objects or equipment such as furniture, stoves, refrigerators, freezers, cans, containers, or other items.

Spanish Fork Municipal Code 8.24.030 makes it a Class C Misdemeanor to maintain or to keep any nuisance on premises owned by any person. Spanish Fork Municipal Code 8.24.040 makes is a Class C Misdemeanor to store unsheltered machinery, implements, personal property, and similar items which are no longer safely useable for the purposes for which they were manufactured for a period of time over 30 days.

Dee Rosenbaum, the chief of police, testified that a letter outlining the problem was delivered to John Burke on December 14, 1992 (Tr. pages 8 to 10).

The condition of the property was described as junk items spread throughout the entire property (Tr. page 14; see exhibits 2-18, record page 62).

The items consisted of scrap metal, piles of wood, tires, bicycle parts, cardboard boxes, parts of machinery, metal tubing, and "things like that." (Tr. page 14).

There is no order to the manner to which these items are stored (Tr. pages 15, 24).

The condition of the items is rusty, not painted, not maintained at all (Tr. pages 16, 24).

Some of the items consist of old clothing used as rags by John Burke in working on his vehicles (Tr. pages 43 to 44.)

The city attempted to work with Mr. Burke for several months to resolve the problem (Tr. page 21).

The condition has effected the value of the adjoining property (Tr. pages 24 to 25).

The condition has caused complaints to be filed with the city (Tr. pages 5, 24).

John Burke was found guilty of "having and maintaining a public nuisance." (Tr. page 51).

#### **SUMMARY OF ARGUMENTS**

##### **I. THE CITY ORDINANCE IS NOT VAGUE NOR UNCONSTITUTIONAL.**

The ordinance spells out with sufficient clarity what is prohibited that reasonable persons are not left in doubt as to its intent.

##### **II. THE EVIDENCE IS SUFFICIENT TO CONVICT THE DEFENDANT.**

The evidence is overwhelming that Mr. Burke has numerous old items scattered haphazardly over his property.

##### **III. THE DEFENDANT RECEIVED A FAIR AND IMPARTIAL TRIAL.**

The trial judge took into account all admissible evidence, accepted as true the proffer of the defense witnesses' testimony and rendered a fair verdict based on the evidence.

##### **IV. THE DEFENDANT WAS NOT PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL.**

The alleged error of defense counsel complained of on appeal did not prejudice the defense and therefore is no basis for reversal.

V. THE DEFENDANT MAKES NUMEROUS ASSERTIONS IN HIS BRIEF AND ADDENDA WHICH WERE NOT RAISED AT TRIAL AND WHICH CANNOT BE CONSIDERED FOR THE FIRST TIME ON APPEAL.

The defendant may not raise arguments for the first time on appeal.

ARGUMENT

I. THE CITY ORDINANCE IS NOT VAGUE NOR UNCONSTITUTIONAL

Mr. Burke claims the city nuisance ordinance is vague and attacks the fact that a portion of the ordinance, 8.24.020 has no penalty provisions.

Utah Code Annotated § 10-8-60 (1953 as amended) reads as follows:

They [cities] may declare what shall be a nuisance, and abate the same, and impose fines upon persons who may create, continue or suffer nuisances to exist.

Spanish Fork City has opted to use the authority granted it by state law to declare what is a nuisance and to impose fines. In looking at the entire ordinance, 8.24.020 sets forth definitions, while 8.24.030 and 8.24.040 set forth penalties, making an offense a Class C Misdemeanor.

The ordinance identifies with sufficient clarity what is a nuisance so that no one is left to wonder. Furthermore, the ordinance requires notice to be sent directing the premises to be cleaned up prior to bringing any criminal action. This was done in the present case, identifying the specific items which needed to be removed or stored within a building. (Exhibit 1, record page 62).

This letter also notified Mr. Burke that a violation was a Class C Misdemeanor. There is no question in this case as to what was required and what the penalty was for failure to do so.

This is sufficient to meet the standard set forth in U.S. Civil Service Commission vs. National Association of Letter Carriers 413 U.S. 548, 935 Ct. 2880 (1973), when the court stated, in upholding a vagueness challenge to the statute in that case:

but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

413 U.S. at 578-79.

While that case dealt with free speech issues, the analysis concerning the argument of constitutional vagueness is appropriate to this case.

## **II. THE EVIDENCE WAS SUFFICIENT TO CONVICT THE DEFENDANT**

Mr. Burke claims that the city's evidence is insufficient. However, the testimony and exhibits introduced overwhelmingly convict Mr. Burke of maintaining a nuisance. In looking at the photograph marked as exhibit 9, Mr. Burke himself testified that this photo was an accurate reflection of the condition of his property (Tr. page 40).

Exhibits 2 through 7 are photographs taken November 25, 1992, when the letter identified as exhibit 1 was prepared (Tr. page 9). The conditions reflected in those photographs were the

same as January 15, 1993, except that "there were additional things being brought in." (Tr. page 11).

In exhibit 8, there are "stacks of wood, piles of old fencing and metal and a lot of weeds." (Tr. page 12).

This condition on June 28, 1993 was essentially unchanged from seven months earlier when exhibit 1 was prepared.

Exhibits 9 through 18 are photographs taken June 18, 1993, (Tr. page 14). These exhibits show "the condition that we are concerned about. There is a lot of scrap metal. There are some piles of wood. There are a lot of items that are just old unused items. Tires, bicycle parts, cardboard boxes with things in them, metal parts of machinery, metal tubing, things like that." (Tr. page 14).

The testimony reflected that there was no order or method to the organization of items in Mr. Burke's yard (Tr. pages 15, 24).

The only evidence to refute the city's evidence is Mr. Burke's testimony that he has use for the items (Tr. page 30), some of which have no immediate use, but future use (Tr. page 42).

The fact that the items may have use is no defense to the charge. Mr. Burke can store these items in a building that is sheltered from view without being in violation of the ordinance. The ordinance prohibits unsheltered storage of these types of items (8.24.040.) and the scattering over the premises of lumber, junk, trash, debris, abandoned, discarded or unused objects or equipment (8.24.020).

### III. THE DEFENDANT RECEIVED A FAIR AND IMPARTIAL TRIAL

The Defendant complains of not receiving a fair trial since some witnesses were not called and the judge referred to Mr. Burke as a "pack rat" (Appellant's Brief page 6). However, the court took as true the proffered testimony of Mr. Burke's witnesses that the items could be used (Tr. page 50). This is actually more prejudicial to the city than to Mr. Burke as the city was left without the ability to cross examine the witnesses. Nevertheless, it makes no difference. As pointed out in section II, whether the items can be used is not a defense to the action. Mr. Burke merely needs to store the items in a sheltered building. Indeed, the judge was complimentary of Mr. Burke's art work. The court noted "Then he has quite a beautiful looking milk can with a scene portrayed as cut-out portion of the milk can. Then he has some watering cans that have got scenes painted on them that are really quite nice." (Tr. page 48).

After hearing the evidence, the judge found Mr. Burke guilty of maintaining a nuisance as outlined in the ordinance. Explaining his ruling, the judge did mention Mr. Burke was a pack rat. However, taken in context, there was no prejudice shown to Mr. Burke, nor were his rights infringed. The court stated:

Mr. Burke, I am going to find you guilty of having and maintaining a public nuisance. You were given notice of that on November 25 and given time to take care of the property. Then the city charged you in January and attempted to let you work this out through a building permit. That was not successful.

You just haven't taken care of it sir. It's just junk. Old tires are junk. You can hardly even get the dump to take them any more, they are such junk. So I hardly

think you can call these things items which you would sell. You have testified in court under oath that this is not a business. I don't know too many people that are collecting tires as antiques or collectibles unless they go on a Model T or something.

But in any event, they are so randomly and haphazardly and out in the elements and with weeds growing through them and in rusty condition, if they had any value at all, that value ceased to exist a long time ago, the way that you have taken care of things. Here's pictures of snow piled all over them.

It's just junk, and I don't think that the city, I don't think that the neighbors should be subjected to that. No one should have to live next to that or try to conduct a business to a pack rat. I would just say that you are basically a pack rat or a collector of worthless items. You just kind of throw them in and once in a while take something out, put something back in and it's a mess. It's an absolute mess.

(Tr. pages 51 to 52)

#### **VI. THE DEFENDANT WAS NOT PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL**

Mr. Burke acknowledges his trial counsel, Paul Merrill, is competent in the law, but claims physical limitations hinder him (Appellant's brief, page 21). These supposed physical limitations do not affect the ability to prepare and file motions as claimed by Mr. Burke. The fact that John Burke filed his own motions is because he desired to do so. He would have filed his own motions despite who the attorney was. The fact the Defendant filed numerous motions on his own does not rise to the level of ineffective assistance of counsel. The other claimed error is Mr. Merrill's partial hearing loss prevented Mr. Burke from calling additional witnesses. Any error in this respect was not prejudicial, as their proffer that these were items that could be

useful was accepted by the court. This prejudices the city more than Mr. Burke since it eliminated the right of cross examination. However, as already pointed out, the fact an item may have some usefulness is not a defense under the ordinance. Thus, the opportunity to call those witnesses, lost due to Mr. Merrill's hearing, is not prejudicial. The testimony desired is immaterial. Surely, any witness who could testify about material issues would have had that opportunity. The court did not refuse additional witnesses without first ascertaining their purpose. The court asked who the next witness was and what the purpose of the testimony would be (Tr. pages 49 to 50). Conduct in this matter certainly does not rise to the level of ineffective assistance of counsel. Indeed, conduct which does not prejudice the Defendant cannot be ineffective assistance of counsel. State vs. Brooks 225 U.A.R. 15 (Utah App. 1993).

**V. THE DEFENDANT MAKES NUMEROUS ASSERTIONS  
IN HIS BRIEF AND ADDENDA WHICH WERE NOT RAISED AT TRIAL  
AND WHICH CANNOT BE CONSIDERED FOR THE FIRST TIME ON APPEAL**

Mr. Burke complains of selective prosecution and points to an earlier case he was involved in. This is immaterial. The city objects to those references, together with all addenda which refer to the same. These matters were not raised in the trial court and cannot be raised for the first time on appeal. See State vs. Brooks 225 U.A.R. 15 (Utah App. 1993), State vs. Archambeau 820 P.2d 920 (Utah App. 1991).



### CONCLUSION

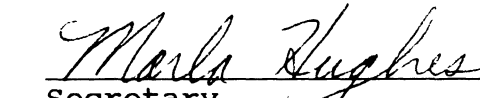
The Spanish Fork City nuisance ordinance is constitutional and enforceable. The evidence was overwhelming to convict Mr. Burke, after a fair and impartial trial. Mr. Burke was not prejudiced by ineffective assistance of counsel. Mr. Burke may not raise issues for the first time on appeal. The conviction of John Burke should be upheld.

DATED this 11th day of February, 1994.

  
S. Junior Baker

### CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing, postage prepaid, to Mr. Michael J. S. Thompson, 881 South Orem Boulevard, Suite 3, Orem, UT 84058, this 14<sup>th</sup> day of February, 1994.

  
Secretary

## ADDENDUM

**8.20.040. Discretion of Inspector.**

The city inspector shall be granted the discretion to determine whether weeds, garbage or refuse, are unsightly or deleterious objects or whether structures create a fire hazard, source of contamination, or pollution of water, air or property, a danger to health, a breeding place or habitation for insects or rodents or other forms of life deleterious to human habitation or are unsightly or deleterious to their surroundings.

**8.20.050. Governmental Immunity.**

The department of public safety, the city inspector referred to herein, or any city employee working under the direction of either the city inspector or the public safety department, together with the city shall be immune from any liability by reason of the city's removal of any nuisances identified herein, after following the procedures set forth in Utah Code Annotated §10-11-1 et seq. (1953 as amended).

**Chapter 8.24. Nuisances.****8.24.010. Nuisance.****8.24.020. Definition of Nuisance.****8.24.030. Duty of Maintenance of Private Property.****8.24.040. Storage of Personal Property.****8.24.050. Notice.****8.24.010. Nuisance.**

The city hereby incorporates as though fully set forth herein, the provisions of Utah Code Annotated §76-10-801 et seq. to define, control, eliminate, and set the punishment for any nuisance offense occurring within the city.

**8.24.020. Definition of Nuisance.**

Notwithstanding any provisions of state law, a nuisance is also defined to mean any condition or use of premises or of building exteriors which are deleterious or injurious, obnoxious or unsightly which include, but is not limited to keeping nor depositing on, or scattering over the premises;

- a. Lumber, junk, trash, or debris;
- b. Abandoned, discarded, or unused objects or equipment such as furniture, stoves, refrigerators, freezers, cans, containers, or other items.

**8.24.030. Duty of Maintenance of Private Property.**

No person owning, leasing, occupying, or having charge of any premises shall maintain or keep any nuisance thereon, nor shall any such person keep or maintain such premises in a manner causing substantial diminution in the

value of the other property in the neighborhood in which such premises are located.

Violation of this section is a class C misdemeanor.

**8.24.040. Storage of Personal Property.**

Unsheltered storage of old, unused, stripped machinery, junk machinery, implements, equipment or personal property of any kind which is no longer safely usable for the purpose for which it was manufactured or intended for a period of thirty (30) days or more (except in licensed junk yards) within this municipality, is hereby declared to be a nuisance and dangerous to the public safety.

A violation of this section is a class C misdemeanor.

**8.24.050. Notice.**

Prior to bringing any criminal action for violating any of the sections under this chapter, the city shall first cause a notice to be sent to the person, owning, leasing, occupying, or having charge of the premises directing the clean-up to be completed and allowing thirty (30) days for the same to be accomplished.

**Chapter 8.28. Fire Code.****8.28.010. Uniform Fire Code Adopted.****8.28.020. Penalty - False Alarms.****8.28.030. Violations.****8.28.040. Outdoor Burning.****8.28.050. Penalty.****8.28.010. Uniform Fire Code Adopted.**

The city adopts by reference thereto the Uniform Fire Code published by the International Conference of Building Officials and the Western Fire Chiefs Association, as it may from time to time be amended. No fewer than three (3) copies of said Uniform Fire Code shall be filed in the office of the city building inspector for the public's inspection and use. The provisions of said code are adopted as fully as if set out at length in this chapter, and said provisions thereof shall be controlling within the corporate limits of the city.

**8.28.020. Penalty - False Alarms.**

Any person, who without cause, gives an alarm of fire by outcry or ringing of bells or otherwise is guilty of a class B misdemeanor.

**8.28.030. Violations.**

Except where otherwise specifically provided, any person violating any provision of the Uniform Fire Code as adopted herein is guilty of a class C misdemeanor.

SPANISH FORK CITY

POLICE DEPARTMENT

November 25, 1992

"Big John's"  
Attention: John Burke  
RT #1 Box 419  
Spanish Fork, Utah 84660

Dear Mr. Burke:

This letter is to give you notice of your violation of §8.24.020, 030, and 040 of the Spanish Fork Municipal Code. These sections prohibit the maintenance of a nuisance. A nuisance is defined as the condition or use of premises which includes scattering of abandoned, discarded, or unused objects. It also includes the unsheltered storage of old, unused, stripped machinery, junk machinery, and implements, equipment, etc.

The following items on your property need to be removed or enclosed within an appropriate building: scrap metal, bicycles & parts, flatbed trailer, metal cans, 2 roto-tillers, cushions, electrical conduit, riding lawn mower, push mowers, metal bed frame, scrap pieces of metal swing set, 3-wheel electrical cart/trailer, fertilizer spreader, fencing, hubcaps, old garden tools, old farming equipment, old tub, wagon, wheel barrow, wood, truckbed tool box, assortment of containers: (tool, gas, water, metal, plastic, etc.) shelving, vehicle tires, vehicle parts. All other miscellaneous items scattered about the property should also be removed.

If these items are not cleaned up within 30 days, criminal proceedings will be initiated pursuant to §8.24.050 of the Spanish Fork Municipal Code. This violation constitutes a class C misdemeanor.

The growth and expansion of the city mandate that this be done without delay. Please call if you have any questions.

Sincerely,

Dec Rosenbaum  
Spanish Fork City Police Chief

DR:msh

**FOURTH CIRCUIT COURT, STATE OF UTAH  
UTAH COUNTY, SPANISH FORK DEPARTMENT**

<div>SPANISH FORK CITY,</div> <div>Plaintiff,</div> <div>vs.</div> <div>JOHN BURKE,</div> <div>Defendant.</div>	<div>JUDGMENT AND SENTENCE</div> <div>Criminal No. 931000086</div>
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APPEARANCES: Junior Baker, Atty. for Plaintiff  
Paul Merrill, Atty. for Defendant

On the basis of Guilty Verdict, Defendant was convicted of the offense of Creating a Public Nuisance. No legal reason having been shown why judgment should not be pronounced, the Court now adjudges Defendant guilty of said offense and sentences Defendant to be confined in the Utah County Jail for a term of 90 days and to pay a fine in the amount of \$500. Court stays execution of the sentence to allow the defendant time to comply by cleaning up his property.

(X) Defendant is placed on probation for a period of 12 months upon the conditions stated in the Court's Order of Probation made in this case.

Dated: August 6, 1993

BY ORDER OF THE COURT:

  
Circuit Court Judge

**FOURTH CIRCUIT COURT, STATE OF UTAH  
UTAH COUNTY, SPANISH FORK DEPARTMENT**

SPANISH FORK CITY,	<b>ORDER OF PROBATION</b>  Case No. 931000086
Plaintiff vs	
JOHN BURKE,  Defendant.	

Defendant is granted probation for a period of 12 months on the following conditions, all of which are stated to Defendant in open court, and which Defendant then and there accepted and agreed to abide by:

1. Defendant is to keep the Court advised of Defendant's mailing address, agrees that service of any notice or order relating to probation sent by regular mail to that address shall be sufficient notice or service, and waives service by any other means.
2. Defendant is to appear in Court whenever given notice or otherwise directed by the Court to do so.
3. Defendant shall not violate any federal, state or municipal law.
4. Court stays execution of the sentence pending review in six months to allow the defendant time to clean up his property.

During Defendant's good behavior and strict compliance with all of the foregoing conditions, the Court orders Defendant's sentence suspended, except for any fine and costs to be paid and jail time to be served as a condition of probation. Defendant is advised that failure to abide by any one or more of said conditions may result in execution of all or any portion of the suspended sentence. The Court retains jurisdiction to make such other and further orders herein as may from time to time appear proper.

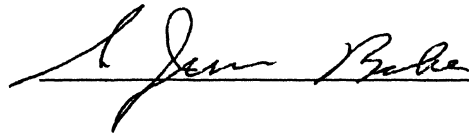
Dated: August 6, 1993

BY ORDER OF THE COURT:

\_\_\_\_\_  
Circuit Court Judge

**CERTIFICATE OF MAILING**

I hereby certify that I mailed a true and correct copy of the foregoing, postage prepaid, to Mr. Michael J. S. Thompson, 881 South Orem Boulevard, Suite 3, Orem, UT 84058, this 1 day of March, 1994.

  
\_\_\_\_\_